CC Docket No. 01-338
WC Docket No. 04-313
Comment by Jeffrey Sobek on behalf of Access One Incorporated

SUMMARY

This comment suggests that the Federal Communications Commission ("Commission" or "FCC") maximize the unbundling requirements of the ILECs. The first part of the comment examines the role UNEs play in promoting competition and making broadband services affordable and universal. The second part examines the rationale for allowing the state commissions to take an active role in the unbundling determinations. The third part suggests that mass market switching continues to be impaired and can be maintained as a UNE despite the *USTA II* court's criticism of the Commission's previous impairment analysis. The fourth part recommends the Commission, in the unbundling framework, address the issue of the ILEC's failure to negotiate commercial negotiations in good faith.

The Availability of Competition and Broadband Services is Increased by the Availability of UNE

Contrary to the position of Chairman Powell, who has vigorously supported the elimination of UNE on the basis that facilities based competition is the best way to promote competition,[1] a policy study conducted by economists at Phoenix Center for Advanced Legal and Economic Public Policy Studies[2] found that "unbundled loop prices based on Total Element Long Run Incremental Cost (TELRIC") are associated with *increased availability* of broadband services and increased availability of *competitive* broadband services."[3] That study analyzed the rates set by the states for unbundled loops in 2002 and 2003 to determine "whether local loop lease rates affect deployment of broadband service" and determined that there was more broadband

[1] *See, e.g.*, Separate Statement of FCC Chairman Michael Powell, *In the Matter of Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order of Notice of Proposed Rulemaking, __ FCC Rcd __, FCC 04-179 (rel. August 20, 2004) (hereinafter "Interim Rules) (UNE-P is a "synthetic form of competition that would never have proved sustainable, or have provided long lasting consumer benefits.").

[2] *See* George S. Ford and Lawrence J. Spiwak, *The Positive Effects of Unbundling on Broadband Deployment,* PHOENIX CENTER POLICY PAPER NO. 19 (September 2004), at http://www.phoenix-center.org/pcpp/PCPP19Final.doc.

[3] *Id.*

deployment in states with lower loop prices.[4] In fact, the economists predicted that if all states increased loop prices according to the same logic used by the FCC in the *Virginia Arbitration Order* (2003)[5], "then about seven million households would be without access to broadband services today".[6]

Accordingly, the Commission should not proceed with establishing new unbundling rules under the incorrect assumption that forcing competitors to become facilities based is the best way to achieve the "Commissions most important statutory objectives: the promotion of competition and the protection of consumers."[7]

State Commissions Must Take an Active Roll in Unbundling Determinations as *USTA II* Did Not Invalidate Such Participation

Although the *USTA II* court vacated the Commission's sub-delegation to state commissions to engage in further granular impairment analysis[8], the court did not invalidate state commissions from taking an active roll in unbundling determinations.[9] Accordingly, the state commissions should be afforded a substantial role in making suggestions as market specific impairment. The FCC should incorporate into its

[4] *Id.*

[5] *In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, Memorandum Opinion and Order, CC Docket No. 00-218 (August 29, 2003) at p.64

[6] Ford, *supra* note 2.

[7] *Interim Rules*, *supra* n. 1.

[8] See *United States Telecom Association v. Federal Communications Commission and United States of America*, 359 F.3d 565-68, 573-74, 594 (D.C. Cir. 2004) (holding that "while federal agency officials may subdelegate their decision making authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities[8]—private or sovereign—absent affirmative evidence of authority to do so."). The *USTA II* court also rejected the FCC's argument that its delegation was permissible pursuant to precedent that supported a federal agency's use of outside parties as fact finders. The court found the delegation to be invalid because "the Order lets the states make crucial decisions regarding market definition and application of the FCC's general impairment standard to the specific circumstances of those markets. *Id.* at 567.

[9] *Id.* at 566. The *USTA II* court stated that there are "three specific types of legitimate outside party input into agency decision-making processes: (1) establishing a reasonable condition for granting federal approval: (2) fact gathering; and (3) advice giving."

unbundling rules findings of market specific impairment based on the proceedings each state undertook in response to the FCC's previous orders. To be valid, the FCC will ultimately have to make the final determination as to whether impairment exists in specific markets, but it can rely on the state commissions findings on the basis that the recommendations were lawful "advice giving" and the detailed evidence as to impairment can be classified as "fact gathering" in accordance with the *USTA II* court's decision. Further supporting the validity of allowing the states to be active in the impairment issue is the fact that the *USTA II* court repeatedly acknowledged that it must "accord considerable deference to...administrative determinations."[10]

Mass Market Switching Continues to be Impaired and Should Continue to be Available as A UNE

The *USTA II* court was critical of the FCC's finding of impairment for mass market switching, but that court did not prohibit the FCC from again finding impairment if such determination is based on lawful analysis. The *USTA II* decision includes a variety of statements made by the court suggesting that the FCC may maintain its previous finding that CLEC's are impaired without access to mass market switching. One example of this is that the *USTA II* court, after providing evidence to support its suggestion that impairment as to mass market switching did not exist, admitted that the "record on the matter is mixed" to such a degree that the FCC's assumption that impairment existed "might be sustainable as an absolute finding, given the deference [the court] would owe the [FCC's] predictive judgment and the inevitability of some over- and under-inclusiveness in the [FCC's] unbundling rules."[11]

Another statement by the *USTA II* court which seems to leave the door open for the FCC to maintain its impairment determination is that "one can imagine the [FCC] successfully identifying criteria based, for example, on an ILEC's track record… that would result from withholding of switches" and yet the [FCC] has "made no visible attempts to explore such possibilities."[12]

[10] *Id*. at 593. See also, Id. at 583 (upholding the FCC's decision because it was "informed"); Id. at 585 (explaining the FCC's decision was valid because it "reasonably found" ....")

[11] *Id.* at 570.

[12] *Id*.

The Failure of the ILECs to Negotiate in Good Faith Should be Addressed by the Unbundling Rules

On March 31, 2004, the FCC unanimously called on telecommunication industry participants to engage in "good faith negotiations to arrive at commercially acceptable arrangements for the availability of unbundled network elements."[13] Since the time of the statement by the FCC, the ILECs have made multiple public statements that they are willing to negotiate in good faith with competitors for UNE replacement services.[14] The fact of the matter however, is that the ILECs are not attempting to negotiate commercially acceptable agreements for UNEs. If the FCC were to research this issue, it is likely the Commission will find that in the vast majority of situations the ILECs only negotiate according to the terms of their own standard form proposals and refuse to consider proposals from the competitors, the rates proposed by the ILECs for currently available UNEs will substantially increase the competitor's costs, and the proposed rates in many instances are more than the retail rates of the ILECs. The obvious conclusion is that the ILECs are not negotiating in good faith because they are not concerned about losing competitors as customers since alternate providers for these elements do not exist (i.e., competitors are impaired without access to these UNEs).

[13] *Press Statement of Chairman Michael K. Powell and Commissioners Kathleen Q Abernathy, Michael J. Copps, Kevin J. Martin and Jonathan S. Adelstein on Trienneal Review Next Steps (rel. Mar. 31, 2004).*

[14] *Interim Rules, supra n.1, n.23.*